



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC 64 OF 2017

GRACE MAUNDU KILUNGYA.....PLAINTIFF

VERSUS

MATHEKA MAKUTHI.....1ST DEFENDANT

MUTISYA LONZA.....2ND DEFENDANT

JUDGMENT

1. Grace Maundu Kilungya who is the plaintiff herein is one of the administrators of the estate of her late husband, Maundu Kilungya, after having been appointed on the 27th April, 2016 vide Machakos High Court Succession Cause No. 563 of 2014. She claims that one Daniel Ndava Maundu sold off land to the two defendants herein before he was appointed as a joint-administrator of the estate in question.

2. By her plaint dated 26th July, 2016 and filed in court on the 10th August, 2016 the plaintiff prays for judgement against the defendants jointly and severally for:

1) A declaration that NZAUI/KIKUMINI/158 is the sole property of the estate of MAUNDU KILUNGYA.

2) A permanent injunction restraining the defendants by themselves, their agents and/or servants from entering onto and/or encroaching and/or remaining on and /or grazing on and or in any other manner whatsoever interfering with land parcel NZAUI/KIKUMINI/158.

3) Costs of this suit and interest.

4) Any other relief that the honourable court deems fit and just to grant.

3. The claim is denied by defendants in their joint statement of defence dated 16th September, 2016 and filed in court on even date. In paragraph 5 of their defence, the first and the second defendants have averred that they bought 2 and 7 acres respectively out of the portion belonging to David Ndava who had an interest in the suit land. They have also averred that they took possession of their respective portions as purchasers for value and have been in occupation and possession of the said portions lawfully while awaiting transfer of their portions to themselves.

4. On 20th December, 2016 the plaintiff filed her reply to the defence, the same being dated 19th December, 2016.

5. The plaintiff's case was that before she and one Daniel Ndava Maundu were appointed as administrators of the estate of Maundu Kilungya, Daniel Ndava Maundu sold land to the two defendants herein. It was also her evidence that she does not know how Daniel Ndava Maundu sold the land in question to the two defendants as she only found houses having been built on the suit land. Further, it is her evidence that the suit premises is still in the name of Maundu Kilungya. She said that she instructed her advocate to issue demand letter to the two defendants before filing this suit.

6. In the support of her evidence, the plaintiff produced letters of administration certificate of official search and demand letter as PEX no. 1,2 and 3 respectively.

7. Her evidence in cross-examination was that Maundu Kilungya had 2 other wives and that he subdivided his land amongst his 3 wives. She said that Nzaui/Kikumini/158 was allocated to her and that she was yet to acquire the title deed for the said land. She denied the suggestion by the defendants' counsel that she was supposed to subdivide land with one Mwikali who is her co-wife. She reiterated that

she does not know how the defendants bought land from Daniel Ndava Maundu.

8. The case for the first defendant was that he bought 7 acres of the suit land from Daniel Ndava Maundu sometime in March, 2014. He said that he took up possession of the suit land where he has built a home where he resides with his family.

9. He said that Daniel Ndava Maundu (DW1) informed him that he was selling part of his share of the suit land as he was entitled to 17 acres of the said property. He added that both the plaintiff and Daniel Ndava Maundu are beneficiaries of the registered proprietor, Maundu Kilungya, who is now deceased.

10. The first defendant disclosed that the two are also joint administrators of the estate of the deceased. He denied having ever trespassed into the suit premises and asserted that he is a purchaser for value. He produced the agreement dated 20th August, 2017 between himself and Daniel Ndava as Dex no. 1 in support of his evidence.

11. His evidence in cross-examination was that when he carried out a search before purchasing the suit property, he found that it belong to Maundu Kilungya. He said that Ndava informed him that he had been allocated his share and that the latter showed him letters of succession. He said that the 34 acre suit land was to be subdivided between 2 people. He pointed out that only Grace Maundu resides on the suit land and revealed that he did not talk to her before he purchased the land from Daniel Ndava. He went on to say that he knows that it is an offence to intermeddle with the property of a deceased person.

12. The defence of the second defendant is similar to that of the first defendant. He too produced a land sale agreement dated 13th March, 2014 as Dex no. 2. His evidence in cross-examination is similar to that of the first defendant save that he told the court that he did not take copies of letters which Ndava showed to him to indicate the size of his share in the suit land.

13. Daniel Ndava Maundu's (DW1) evidence in chief was that Nzau/Kikumini/158 is an asset of his father's estate. He said that he was entitled to 17 acres out of the said parcel of land Nzau/Kikumini/158 and that he sold 7 and 2 acres to the first and the second defendants respectively. According to him, the plaintiff did not consult him before she filed this suit.

14. Ndavas's evidence in cross-examination was that the plaintiff was allocated the land on which she now resides. He said that the plaintiff cited him and others in Machakos High Court Succession Cause No. 771 of 2013. He revealed that he did not file for probate and administration cause as was ordered by the High Court whereupon the plaintiff sought for and was granted leave to file one. This was in Machakos Succession cause No. 563 of 2014 where he filed an objection after which he and the plaintiff were appointed joint administrators. He revealed that he is yet to file for confirmation of the grant (DEX No. 1) dated 11th May, 2016. He admitted that he did not have grant of letters of administration when he sold part of the suit land to the defendants. He said that he did not know that it was against the law to sell such land without letters of administration.

15. The counsel on record for plaintiff and the defendants filed their written submissions on 7th February, 2018 and 14th March, 2018 respectively.

16. Even though the plaintiff's counsel had on the 20th December, 2016 filed a list containing seven (7) issues, in her submissions, she reduced the issues to three (3) namely,

i. Whether the acts of the defendants herein and the said Daniel Ndava Maundu who is a beneficiary of the deceased's estate amount to intermeddling with the deceased's free property.

ii. Whether the selling of the deceased's property prior to the confirmation of the grant by the said Daniel Ndava Maundu a beneficiary of the deceased's estate to the defendants herein offends section 45(i) and section 82 (b) (ii) of the law of succession.

iii. The validity of the transaction between the defendants and Daniel Ndava Maundu.

17. On the other hand, the defendants' counsel framed up the issues for determination as follows:-

a) **Whether the proprietor of land parcel Nzau/Kikumini/158 is one Maundu Kilungya, the deceased.**

b) **Whether Grace Maundu Kilungya has capacity to sue alone on behalf of land parcel member Nzau/Kikumini/158?**

c) **Whether the defendants trespassed into Nzau/kikumini/158?**

d) **Whether this court can issue injunctive orders against the defendants?**

e) **What orders are to costs?**

18. The submissions by the plaintiff's counsel were that section 45 of the Law of Succession Act bars intermeddling with the property of a deceased person. The counsel referred the court to the case of *re Estate of M'Ngarithi M'Muriti [2017]eKLR* as guided by the observation of the court in; *Benson Mutuma Muriungi Vs C.E.O Kenya Police Sacco & Another [2016] eKLR* where the court defined what would constitute intermeddling as follows:-

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law of grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) or protection of the estate against any person.”

19. The counsel further cited section 82 of the same Act which prohibits sale of immovable property before confirmation of grant.
20. Arising from the above, the counsel submitted, Daniel Ndava Maundu was a stranger to the estate of Maundu Kilungya at the time of the alleged sale of part of the deceased's estate to the defendants. She added that Daniel Ndava Maundu was not an administrator at the time and that he lacked capacity to enter into the contracts for sale of the deceased's estate.
21. The counsel correctly submitted that in intestacy, a deceased person retains the legal title and interest to his property until a grant has been confirmed and his estate has been distributed to the beneficiaries when the latter acquire legal title and interest in their respective portions and are capable of transferring the same to other persons .
22. The counsel submitted that the defendants bought nothing from Daniel Ndava Maundu since one cannot purport to sell that which he does not own.
23. The counsel submitted that the acts of Daniel Ndava Maundu amounted to intermeddling with the free property of the deceased and urged the court to find that the plaintiff has proved her case as by law required.
24. The submissions by the defendant's counsel were that the defendants bought portions of suit property from Daniel Ndava Maundu who was a beneficiary of the estate of his father's estate. The counsel pointed out that the defendants were purchasers for value. According to the counsel, the plaintiff has not proved her case on a balance of probabilities.
25. Having read the evidence on record and the submissions filed, my determination is as follows;

The two defendants' evidence was that Daniel Ndava Maundu disclosed to them that he was a joint administrator with the plaintiff of the estate of Maundu Kilungya. In their evidence in cross-examination, the two defendants told the court that Daniel Ndava showed them a letter that indicated that he was entitled to 17 acres out of the 34 acres of the land belonging to the estate of Maundu Kilungya. However no such letter was ever produced in evidence to support the defendants' contention.

26. They admitted that when they carried out a search of the suit property, they realized that it was registered in the name of Maundu Kilungya as can be seen from the certificate of search produced by the plaintiff as PEx No. 2. The agreements by the two defendants and Daniel Ndava (DW1) clearly show that they were entered into 20th August, 2013 and 13th March, 2013 respectively.
27. This was close to 2 years before Daniel Ndava (DW1) and the plaintiff were issued with the grant of letters of administration produced as PEX. No. 1 by the plaintiff. The defendants also rely on the same copy of grant of the same letters of the administration.
28. Daniel Ndava Maundu (DW1) did admit in his evidence in cross-examination that he did not have grant of letters of administration by the time he sold portions of the suit land to the two defendants. In my view, it is clear that Daniel Ndava Maundu (DW1) did not have capacity to sell parts of the estate of Maundu Kilungya in the absence of a confirmed grant. I am in agreement with plaintiff's counsel that the actions of Daniel Ndava Maundu and the two defendants offend the provisions of section 45(1) and 82 (b) (ii) of the Law of Succession Act. Section 45(1) of the Act provides as follows;

“45. No intermeddling with property of deceased person

1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

Section 82 (b) 11 of the same Act provides as follows:-

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:-

- a)
- b) *to sell or otherwise to count, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best.*
 - i.

ii. *no immovable property shall be sold before confirmation of the grant*”

29. From the evidence on record Daniel Ndava Maundu was not a personal representative of the estate of Maundu Kilungya as the time when he and the two defendants entered into land sale agreements in respect of Nzau/Kikumini/158. He had no capacity to enter into the said agreements and neither could he purport to sell that which he did not own. The defendants therefore cannot be heard to say that they are purchasers for value.

30. My finding is that the agreement between Daniel Ndava Maundu and the two defendants are of no probative value. In the circumstances, it is my finding that the plaintiff has satisfied this court that she has on a balance of probabilities a cause of action against the two defendants. I, therefore, proceed to enter judgement for the plaintiff and against the defendants in terms of prayers 1, 2 and 3 of the plaint. It is so ordered.

Signed, dated and delivered at Makueni this 10th day of April, 2018

MBOGO C.G

JUDGE

In the presence of :

Mr. Muthiani for the defendant

Mr. Hassan holding brief for Mrs. Bika for the plaintiff

Mr. Kwemboi Court Assistant

Plaintiff

1st and 2nd Defendants

MBOGO C.G, JUDGE

10/4/2018